BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL ANTHONY BALLARD Claimant	)	
VS.	)	
DONDLINGER & SONS CONST. CO. Respondent	)	Docket No. **1,054,021**
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

This claim is before the Board on remand from the Kansas Court of Appeals. Also pending are two requests for Board review filed by respondent and its insurance carrier (respondent) of Administrative Law Judge (ALJ) John Clark's September 13, 2013, Review and Modification Award and Judge Clark's May 29, 2014, Order denying respondent's Motion for Allocation of Third-Party Recovery. As agreed by the parties, all pending matters are consolidated for purposes of Board review.[1]

The Board heard oral argument regarding the Review and Modification Award on January 22, 2014, in Topeka, Kansas. The parties thereafter agreed to waive further oral and written argument beyond that contained in the record.[2]

APPEARANCES

W. Walter Craig of Derby, Kansas, appeared for claimant. John David Jurcyk of Kansas City, Kansas, appeared for respondent.

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[1] See *Ballard v. Dondlinger & Sons Const. Co.*, No. 1,054,021 (Kan. WCAB June 27, 2014).

[2] *Id*.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the record and the findings in the Board's April 29, 2013, Order, to the extent such stipulations and findings are consistent with the Memorandum Opinion of the Court of Appeals.[3]

ISSUES

Claimant sustained a compensable accidental injury in a head-on motor vehicle accident on October 19, 2010, that aggravated claimant's preexisting cervical condition. There is no dispute claimant sustained an injury to his cervical spine in 2007 that required surgical treatment, nor is it contested that as a result of the 2007 injury and surgery, claimant sustained a 25% permanent functional impairment to the whole body.

The ALJ entered an Award on May 15, 2012, in which he found claimant sustained a work disability of 87.5%, based on a 100% wage loss and a 75% task loss. The ALJ applied the K.S.A. 2010 Supp. 44-501(c) credit for preexisting impairment by subtracting 25% from the 87.5% work disability, resulting in a work disability of 62.5%. Despite the credit, claimant's total award was the $100,000 maximum for permanent partial disability (PPD) awards.[4]

At respondent's request, the Award was reviewed by the Board, which issued an Order on April 29, 2013, affirming the Award in all respects. Respondent appealed the Board's Order to the Court of Appeals.

On April 3, 2013, while the appeal was pending before the Court of Appeals, claimant filed an Application for Review and Modification of the Award. A hearing was held on the application, and Dr. David Hufford's deposition was taken. The ALJ entered a Review and Modification Award on September 10, 2013, in which claimant was found to be permanently and totally disabled. The Review and Modification Award was made effective on October 2, 2012, six months before the Application for Review and Modification was filed.[5] Respondent requested Board review of the Review and Modification Award, contending the ALJ erred in not reducing the Review and Modification Award by claimant's preexisting 25% functional impairment using the method of computation approved in *Payne v. Boeing Co.*,[6] and by finding claimant permanently and totally disabled.

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[3] See *Ballard v. Dondlinger & Sons Const. Co., Inc.,* No. 109,905 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

[4] See K.S.A. 2010 Supp. 44-510f(a)(3).

[5] See K.S.A. 2010 Supp. 44-528(d).

[6] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

Claimant argues the Review and Modification Award should be affirmed.

On May 8, 2014, respondent filed with the ALJ a Motion for Allocation of Third-Party Recovery. After a hearing on the Motion, the ALJ entered an Order on May 29, 2014, denying respondent's Motion because "[t]here are issues pending before the Workers Compensation Board and the Kansas Court of Appeals."[7] Respondent appealed the May 29, 2014 Order, maintaining the ALJ erred in denying respondent's request for a subrogation credit pursuant to K.S.A. 2010 Supp. 44-504.

The Kansas Court of Appeals issued a Memorandum Opinion on May 9, 2014, holding the Board's Order of April 29, 2013, was affirmed in part, reversed in part, and remanded to the Board with directions.

The issues for the Board's consideration are:

1. Is claimant permanently and totally disabled?

2. How should respondent's credit for claimant's 25% preexisting functional impairment be computed?

3. Is respondent entitled to a subrogation credit by virtue of claimant's third party recovery?

FINDINGS OF FACT

With one exception, the Memorandum Opinion of the Court of Appeals affirmed the Board's April 29, 2013, Order. The Court reversed the method by which claimant's 25% preexisting whole body impairment of function should be applied to reduce claimant's PPD Award. Citing, inter alia, its *Ward v. Allen County Hospital*[8] opinion, the Court held:

> All things considered, we are persuaded that the calculation adopted by the *Ward* panel is consistent with the plain language and legislative intent of K.S.A. 2010 Supp. 44-501(c) in permanent partial disability cases wherein the claimant's award is statutorily capped at $100,000. As a result, while we agree with [respondent] that the Board erred in its calculation of the award of compensation, we decline [respondent's] invitation to follow the *Payne* approach under these circumstances. We hold the plain language of K.S.A. 2010 Supp. 44-501(c) clearly contemplates the meaningful reduction of a claimant's award equivalent to the claimant's preexisting functional impairment. Applying K.S.A. 2010 Supp. 44-501(c) as written requires the

[7] ALJ Order (May 29, 2014) at 1.

[8] *Ward v. Allen County Hospital*, 50 Kan. App. 2d 280, 324 P.3d 1122 (2014).

> Board to reduce [claimant's] $100,000 statutorily capped award by his 25% preexisting functional impairment.[9]

The Court of Appeals remanded this claim to the Board with directions to calculate claimant's award in accordance with the Court's opinion. Review by the Kansas Supreme Court of the Court of Appeals' Memorandum Opinion was not requested.

At the June 6, 2013, Review and Modification Hearing, claimant testified he experienced neck pain and "buzzing/tingling in [his] neck and shoulder."[10] According to claimant, his pain "gets worse and worse."[11] Claimant further testified his low back and lower extremity pain "increased significantly" since he last testified.[12]

Dr. David Hufford, a practicing physician emphasizing occupational medicine, non-operative orthopedics and sports medicine, examined claimant for the second time at his counsel's request on May 12, 2013. Updated history revealed claimant experienced a worsening of his symptoms, especially in the low back, and claimant had been placed in chronic pain management. Physical examination of the cervical spine was "relatively stable and constant" compared to the previous examination.[13] The doctor found no significant differences between his previous examination of the low back[14] and his May 12, 2013, examination.[15] Dr. Hufford found claimant had developed an antalgic gait. He testified claimant's functional impairment did not increase, no new restrictions were imposed, and the diagnoses did not change.[16]

However, in Dr. Hufford's opinion, claimant "was very likely realistically unemployable in the open labor market," based on claimant's increase in symptoms, his need for chronic pain management and his physical limitations.[17]

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[9] *Jamison v. Sears Holding Corp.,* No. 109,670 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

[10] R.M.H. Trans. at 10.

[11] *Id*.

[12] *Id.* at 11.

[13] Hufford Depo. (May 7, 2013) at 7.

[14] Dr. Hufford's first evaluation occurred on November 11, 2011, and he was initially deposed on February 23, 2012.

[15] Hufford Depo. (May 7, 2013) at 7.

[16] *Id.* at 7, 14, and 16.

[17] *Id.* at 8.

Claimant pursued a third-party claim against the driver of the other vehicle involved in the October 19, 2010, collision. On July 30, 2012, the third-party claim was settled with the auto liability carrier, State Auto Insurance Company (State Auto), for policy limits of $100,000. The workers compensation carrier, Zurich American Insurance Company (Zurich) approved the $100,000 settlement, subject to its subrogation lien. It is unclear from the record if suit was filed in the third-party claim.

At the time of the third-party settlement, Zurich had paid $55,848.81 in compensation and medical aid in the workers compensation claim. After the settlement, State Auto issued two checks:

1. In the amount of $44,151.81 ($100,000 third-party settlement minus the $55,848.81 respondent paid in compensation and medical in the workers compensation claim). From this amount, claimant received $29,240.02 after deduction for attorney fees and expenses to Paul Hogan, claimant's counsel in the third-party claim.

2. In the amount of $55,848.81, made payable to claimant, Mr. Hogan, and Zurich. Mr. Hogan possesses this check and no issue regarding its status is raised before the Board.

Respondent claims a credit against future payments for compensation and medical expenses of $29,240.02, the amount of the third-party recovery already received by claimant. Respondent continued paying PPD and medical compensation while the claim was pending before the Court of Appeals.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any

type of substantial, gainful employment.[18] An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[19]

The existence, nature and extent of the disability of an injured worker is a question of fact.[20] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making his own determination.[21]

K.S.A. 44-528 (Furse 2000) provides in relevant part:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

K.S.A. 2010 Supp. 44-504 provides in relevant part:

> (a) When the injury or death for which compensation is payable under the workers compensation act was caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages, the injured worker or the worker's dependents or personal representatives shall have the right to take compensation under the workers compensation act and pursue a remedy by proper action in a court of competent jurisdiction against such other person.

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[18] K.S.A. 2010 Supp. 44-510c(a)(2).

[19] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[20] See *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923, *rev. denied* 259 Kan. 927 (1996).

[21] See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

> (b) In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse. The employer shall receive notice of the action, have a right to intervene and may participate in the action. The district court shall determine the extent of participation of the intervenor, including the apportionment of costs and fees. Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker or the worker's dependents or personal representative prior to the completion of compensation or medical aid payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment, settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid. Such action against the other party, if prosecuted by the worker, must be instituted within one year from the date of the injury and, if prosecuted by the dependents or personal representatives of a deceased worker, must be instituted within 18 months from the date of such injury.

1. Review and Modification/Permanent Total Disability

No party challenges the authority of the ALJ to entertain and decide claimant's Application for Review and Modification while the claim was pending before the Court of Appeals.[22] Respondent does challenge the ALJ's finding claimant is permanently and totally disabled.

The Board agrees with the ALJ that effective October 2, 2012, claimant is entitled to compensation based on permanent total disability. The testimony of both claimant and Dr. Hufford support the ALJ's decision. Claimant testified his low back pain increased significantly since his pre-Award testimony.[23] Claimant also testified his pain gets "worse and worse."[24] Dr. Hufford testified that although claimant's physical findings, impairment of function, diagnoses, and restrictions were substantially the same in his two examinations, claimant's symptoms had increased significantly, claimant had developed an altered gait, and claimant was placed in chronic pain management.

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[22] See *Brown v. Goodyear Tire and Rubber Co.*, 211 Kan. 742, 744, 508 P. 2d 492 (1973); *Brewington v. The Western Union Telegraph Co.*, 163 Kan. 534, 188 P. 2d 872 (1947); *Ford v. Landoll Corporation*, No. 210,488, 2001 WL 507180 (Kan. WCAB Apr. 25, 2001).

[23] See R.M.H. Trans. at 11.

[24] *Id*. at 10.

Further, Dr. Hufford testified claimant was very likely unemployable in the open labor market. The testimony of claimant and Dr. Hufford was uncontradicted. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[25]

2. Credit for Preexisting Functional Impairment

The Court of Appeals' decision regarding this issue, and its directions to the Board on remand, were predicated on claimant's entitlement to an award based on permanent partial general (work) disability. However, as found by the ALJ and the Board, claimant is, effective October 2, 2012, entitled to compensation based on permanent total disability pursuant to K.S.A. 2010 Supp. 44-510c(a).

The Board in *Ford v. Landoll Corporation*[26] discussed the relationship between an original award and an award on review and modification:

> When the basis for review and modification is changed circumstances, the issues before the judge in a review and modification proceeding are different than the issue decided in the original award. The review and modification addresses the changed circumstances and determines the award for the period beginning with the effective date of the modification. On the other hand, the original award addresses the facts at the time of the regular hearing and determines the award for the period beginning with the date of accident.[27]

Applying the K.S.A. 44-501(c) credit in compliance with the Memorandum Opinion of the Court of Appeals, claimant is entitled to a total award of $75,000 ($100,000 statutory maximum minus 25% preexisting functional impairment), payable at the rate of $545 per week. However, PPD is only payable from the October 19, 2010, accident until the effective date of the Review and Modification Award on October 2, 2012.

From October 2, 2012, forward, claimant is entitled to compensation based on permanent total disability, which must be reduced by the credit for preexisting impairment pursuant to *Payne*. Under *Payne*, the total amount of permanent total disability benefits to which claimant is entitled is computed as follows:

a. $125,000 (maximum for awards of permanent total disability) divided by the compensation rate of $545 equals 229.36 weeks.

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[25] See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[26] *Ford, supra.*

[27] *Id.* at 4-5.

b. 25% of 415 weeks equals 103.75 weeks.

c. 229.36 weeks minus 103.75 weeks equals 125.61 weeks.

d. 125.61 weeks at $545 per week equals $68,457.45.

Hence, claimant is entitled to temporary total disability (TTD) benefits for 8.94 weeks, followed by permanent partial general (work) disability benefits, payable at the weekly rate of $545, through October 1, 2012, followed by permanent total disability benefits, payable at the rate of $545 per week, commencing on October 2, 2012, for a total award of $68,457.45, less TTD and PPD already paid. The corrected compensation calculations are set forth in the "AWARD" section of this Order.

The dissenting opinion makes persuasive arguments regarding the anomalous results that can occur in applying *Payne* under the circumstances of this claim. The Act does evidence a legislative intent that claimants with permanent total disabilities should receive more permanent disability compensation than claimants with permanent partial disabilities.[28] Despite that legislative intent, claimant in this claim, who is permanently totally disabled, receives a total award of $68,457.45, whereas if claimant had remained permanently partially disabled, his total award would be $75,000. If the *Ward, Jamison* and *Ballard* analysis is applied in this claim, claimant's total award would be $93,750.00. All five Board members agree that the application of *Payne* in this claim leads to an inequitable result.

However, the fallacy in the conclusions of the dissenting opinion is that *Payne* is still valid case law and, as such, is binding on the Board. The Board is duty bound to follow binding precedent.[29] *Payne* has not been overruled and unless it is, the Board should follow *Payne's* method of calculating the offset for preexisting functional impairment in claims involving permanent total disability. The dissenting Board Members essentially speculate that the Court of Appeals should overrule *Payne* based on the reasoning of *Ward, Jamison* and *Ballard,* but the Court has not done so. The Board should not attempt to anticipate what cases the appellate courts will or will not overrule.

3. Subrogation Credit Due to Claimant's Third-Party Recovery

Claimant, as he had a right to do, pursued not only this workers compensation proceeding but also a third-party case against the other driver involved in the motor vehicle accident which caused claimant's injuries. Claimant settled the third-party claim on July 30, 2012, for $100,000, the policy limits of the auto carrier, State Auto. The workers

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[28] See K.S.A. 2010 Supp. 44-510f(a)(1) and (a)(3).

[29] See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998).

compensation carrier, Zurich, was aware of the settlement and approved it.[30] At the time of the settlement of the third-party claim, respondent had paid compensation and medical expenses in the workers compensation claim totaling $55,848.81. No party has raised an issue before the Board regarding respondent's lien against that amount.

The issue the Board must address concerns whether respondent is entitled to a credit against future compensation and medical expenses by virtue of claimant's receipt of the balance of the $100,000 settlement, $44,151.81. That amount was paid to claimant and his third-party claim counsel, Paul Hogan. After deducting Mr. Hogan's fees and expenses, claimant actually received $29,240.02. The plain language of K.S.A. 44-504(b) provides for subrogation liens and subrogation credits, and the statute makes a clear distinction between the two. The statute is clear that respondent is entitled to a subrogation credit in the amount of $29,240.02 against workers compensation benefits that accrue after claimant's tort recovery or will accrue in the future. Respondent is not required to resume actual payment of medical and compensation benefits until the credited amount has been exhausted.[31]

Claimant contends respondent has no subrogation credit against claimant's $29,240.02 because all or part of that amount represents "loss of consortium or loss of services to a spouse."[32] The fallacy in that notion is there is no evidence in this record to establish claimant was married – either common law marriage or otherwise. Moreover, loss of consortium or loss of services to a spouse must be "determined by a court."[33] There is no determination by a court regarding loss of consortium or loss of services to a spouse reflected in the record, and it is beyond the jurisdiction of the Board to decide such matters.

Claimant also argues respondent can have no subrogation credit because respondent did not exercise its right to intervene in the third-party proceeding. That argument is without merit because "[a]n employer does not waive its right to a subrogation credit against future workers compensation payments when it fails to either intervene or files its notice of lien in District Court."[34]

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[30] Zurich also provided Underinsured Motorist (UIM) coverage. Suit was apparently filed against Zurich on the UIM issues.

[31] See *Wendel v. Ysidro Excavating*, No. 231,463, 2005 WL 831896 (Kan. WCAB Mar. 31, 2005).

[32] K.S.A. 2010 Supp. 44-504(b).

[33] *Id.*

[34] *Kent v. Schmidtlein Electric, Inc.*, No. 163,240, 1998 WL 780842 (Kan. WCAB Oct. 29, 1998).

CONCLUSIONS OF LAW

1. Effective October 2, 2012, claimant is permanently and totally disabled and is entitled to compensation thereof as set forth in the "AWARD" section below.

2. Respondent is entitled to a credit for claimant's preexisting 25% whole body functional impairment as detailed in this Order.

3. Respondent is entitled to a subrogation credit against future medical and compensation benefits in the amount of $29,240.02, and respondent is not required to resume actual payment of medical and compensation benefits until the credited amount has been exhausted.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[35] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that:

1. The ALJ's original Award dated May 15, 2012, is modified to conform to the Memorandum Opinion of the Kansas Court of Appeals dated May 9, 2014, and this Order of the Board.

2. The Review and Modification Award dated September 13, 2013, is affirmed as modified in this Order.

3. Pursuant to K.S.A. 2010 Supp. 44-504, respondent is entitled to a credit against claimant's third-party recovery in the amount of $29,240.02, and respondent is not required to resume payments of medical and compensation benefits until the credited amount has been exhausted.

WHEREFORE, an award of compensation is hereby made in accordance with the above findings in favor of claimant and against respondent for an accidental injury sustained by claimant on October 19, 2010.

Claimant is entitled to 8.94 weeks of temporary total disability benefits at the rate of $545 per week, or $4,872.30, followed by permanent partial disability benefits at the rate

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[35] K.S.A. 2013 Supp. 44-555c(j).

of $545 per week for 98.77 weeks, or $53,829.65, followed by permanent total disability benefits at $545 per week for 17.9 weeks, totaling $9,755.50, for a total award of $68,457.45, all of which is due and owing in one lump sum, less amounts previously paid, subject to respondent's subrogation credit.

IT IS SO ORDERED.

Dated this _____ day of September 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Members dissent from the majority on the method of calculating the award. The majority used the calculation method adopted by the Kansas Court of Appeals in *Payne.*[36] The dissenting Board Members would adopt the calculation method used in *Ward.*[37]

K.S.A. 2010 Supp. 44-501(c) provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

[36] *Payne v. Boeing, supra.*

[37] *Ward v. Allen County Hospital, supra.*

The oft-quoted *Bergstrom*[38] mantra provides: "When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be." K.S.A. 2010 Supp. 44-501(c) is plain and unambiguous in that it requires an award to be reduced by a preexisting functional impairment. However, the Kansas Workers Compensation Act (Act) is silent on **how** the K.S.A. 2010 Supp. 44-501(c) reduction is to be calculated and, therefore, is not plain and unambiguous in that regard. Consequently, the Board and appellate courts have shouldered the responsibility of determining how the reduction should be calculated.

There are three categories of awards where an injured worker sustains a work-related permanent functional impairment: (1) permanent partial disability based upon functional impairment only; (2) permanent partial disability based upon work disability; and (3) permanent total disability.

Where an injured worker has a preexisting functional impairment and later sustains only an increase in permanent functional impairment, calculation of the K.S.A. 2010 Supp. 44-501(c) reduction is straightforward. An example of this situation would be a claimant who has a preexisting low back impairment of 5% and sustains a work-related accident that results in a 10% permanent functional impairment involving his or her low back. For this example, claimant's benefit rate is $500 per week and he or she received no temporary total disability. You simply subtract the preexisting 5% from the overall 10% functional impairment. The resulting 5% is multiplied by 415 weeks, or 20.75 weeks. Claimant would receive $10,375 (20.75 x $500 + $10,375). An alternate method to apply the K.S.A. 2010 Supp. 44-501(c) reduction is to multiply 415 weeks by 10% to get 41.5 weeks and then subtract 415 weeks multiplied by 5% or 20.75 weeks. Under this calculation method, claimant is also entitled to 20.75 weeks of PPD, or $10,375.

The second category of awards is when claimants are awarded permanent partial disability benefits based upon a work disability. Those claimants are limited to $100,000 in PPD benefits by K.S.A. 44-510f(a)(3). In the present case, claimant was originally awarded an 87.5% work disability and had a 25% preexisting permanent functional impairment. His weekly benefit rate was $546. The Kansas Court of Appeals in *Ward, Jamison*[39] and *Ballard,*[40] indicated the reduction should calculated by first multiplying $100,000 by 25% or $25,000, leaving claimant with a maximum award of $75,000.

The third category of cases is when an injured worker is awarded permanent total disability. In the present case, the Board majority and the undersigned Board Members agree claimant, upon his request for review and modification, is permanently and totally

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[38] *Bergstrom v. Spears Mfg. Co.,* 289 Kan. 605, 214 P.3d 676 (2009).

[39] *Jamison v. Sears Holding Corp., supra.*

[40] *Ballard v. Dondlinger & Sons Const. Co., Inc., supra*.

disabled. Under K.S.A. 44-510f(a)(1) claimant is limited to $125,000 in disability benefits. The majority used the *Payne* calculation method, which is set forth at pages eight and nine, and need not be repeated here. Applying the *Payne* calculation method, results in claimant receiving only $68,457.45 in benefits. If the *Ward* calculation were applied, claimant's disability benefits would be reduced by multiplying $125,000 by 25%, resulting in an award of $93,250. The undersigned Board Members believe the calculation method prescribed by the Kansas Court of Appeals in *Ward* should be utilized in the present case for several reasons.

When claimant was found to be permanently partially disabled, he was awarded $75,000. Claimant then filed an Application for Review and Modification and was found permanently and totally disabled by the ALJ and the Board. Claimant went from being employable to likely unemployable in the open labor market. Claimant's symptoms increased, he developed an altered gait and was placed in chronic pain management. However, now that claimant's symptoms have increased and he has been found to be permanently totally disabled, he receives less compensation, only $68,457.45. It is egregious for an injured worker who is permanently and totally disabled to receive less disability benefits than if that same worker was only permanently partially disabled.

The undersigned Board Members believe the Kansas Legislature intended permanently and totally disabled workers to receive higher benefits than those workers that are capable of returning to work, but have a work disability. That is evidenced by the fact the legislature capped PPD at $100,000, while PTD was capped at $125,000. Using the *Payne* calculation method in the current case does exactly the opposite.

Using the *Payne* calculation method penalizes those workers with higher wages and weekly benefit rates. If claimant's weekly benefit rate was $200, the calculation of his award under *Payne* would be as follows:

a. $125,000 divided by the weekly compensation rate of $200 equals 625 weeks.

b. 25% of 415 weeks equals 103.75 weeks.

c. 625 weeks minus 103.75 weeks equals 521.25 weeks.

d. 521.25 weeks at $200 per week equals $104,250.

Thus, if claimant's weekly benefit rate was $200, instead of $555, he would receive an additional $35,793.55 ($104,250 - $68,457.45 = $35,793.55) in benefits. In some instances, a lower paid injured worker with a preexisting functional impairment could receive nearly all of the $125,000 maximum benefits.

Under *Payne,* claimant receives $68,457.45, which is only 54% of $125,000. The *Ward* calculation method accomplishes what K.S.A. 2010 44-501(c) intends: a reduction of the award by the amount of claimant's preexisting functional impairment. *Payne* reduces claimant's award by 54%, not 25%, the amount of his preexisting functional impairment. If claimant's weekly benefit rate were $200, his award would only be reduced by 16.6% ($125,000 - $104,250 = $20,750. $20,750 ÷ $125,000 = 16.6%). Under that scenario there would not be the statutorily required 25% reduction.

Applying *Payne* results in disparate treatment of higher wage earners. It is the opinion of the undersigned that *Ward* provides a fair method of applying the preexisting credit in this and similar cases by reducing the statutory maximum amount by the percentage of preexisting impairment.

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BOARD MEMBER

_____
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